SUPREME COURT, U. S.

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in the

# Supreme Court

of the

# United States

**OCTOBER TERM, 1973**

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## No. 73-1172

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AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS,

*Petitioner,*

*vs.*

BLUE CROSS OF FLORIDA, INC. and BLUE SHIELD OF FLORIDA, INC.,

*Respondents.*

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Blue Cross of Florida, Inc. and Blue Shield of Florida, Inc. respectfully submit this brief in opposition to the Petition of American Family Life Assur-

ance Company of Columbus for a writ of certiorari and pray that the Petition be denied by this Court.

## STATUTES INVOLVED

Petitioner omitted from its statement of "Statutory Provisions Involved" two provisions of the McCarran-Ferguson Act, and Chapter 641 of the Florida Statutes.

(1) Section 1 of the McCarran-Ferguson Act, 15 U.S.C. § 1011 (59 Stat. 33) provides:

> "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

(2) Section 2(a) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(a) (59 Stat. 33) provides:

> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

(3) Chapter 641 of the Florida Statutes, provides in pertinent part:*

*Chapter 641 of the Florida Statutes, in its entirety, establishes a comprehensive system of State regulation of nonprofit hospital and medical service plans.

(a) ". . . nonprofit medical or surgical or hospital service plan or plans in the state . . . shall be governed by this law and subject to regulation and supervision by the department of insurance and all provisions of the laws of Florida applicable to health, sick or accident insurance . . ." Chapter 641.01, Florida Statutes.

(b) "The department of insurance shall issue a certificate of authority . . . upon being satisfied . . . that each contract issued or proposed to be issued to subscribers to the plan, is in a form approved by the department of insurance and that the rates charged or proposed to be charged for each form of such contract and benefits to be provided, are fair and reasonable." Chapter 641.04(3)(c), Florida Statutes.

## QUESTIONS PRESENTED

The "Questions Presented" as stated by the petitioner do not fairly arise from the record in or the decisions of the courts below. Petitioner's questions 1 and 3, directed to the question of the existence of an alleged boycott, attempt to present essentially factual contentions Petitioner unsuccessfully urged below. Petitioner's questions 2, 4 and 5 attempt to advance propositions of

law based on the missing and essential predicate, negated by the record, of the existence of an alleged boycott.

In Respondents' view, because all five of petitioner's proposed questions arise from its alleged claim of boycott, and the Courts below did not find the existence of or discuss the legal consequences of such an alleged boycott, the only possible question presented by this case, emerging not from the findings or opinions of the Courts below but from petitioner's contentions, is whether the indirect side effect of a group insurance policy provision excluding benefits for expenses paid for under another policy, as a matter of law, constitutes a boycott illegal *per se* in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

## STATEMENT OF THE CASE

### (1) Petitioner's Statement.

Petitioner's Statement of the Case is based almost exclusively upon its own peculiar and highly subjective characterization of selected facts, and has no reasonable relation to the findings of fact by the District Court or the opinions of the District Court and the Court of Appeals. Petitioner, for a few typical examples: (1) states that it is "typical of the non-COB carriers" (Pet. p. 5) although it stated in the Court below that "the only company plaintiff is aware of which [is] boycotted and excluded . . . is plaintiff itself." (App. 590); (2) states that the District Court found that "respondents themselves adopted COB because they had felt its exclusionary effect" (Pet. p. 6) although the District Court, to the contrary, found "it

[COB] was put into use so that defendants could remain competitive" (Pet. App. p. 17a); (3) states that the Court of Appeals "found that COB excluded petitioner from the market"* (Pet. p. 6) although the Court of Appeals, in fact, made no such finding and, to the contrary, expressly described the effect of COB as "tough competition" which passes savings on to consumers and reduces the cost of respondents broad risk coverage to the insured (Pet. App. p. 10a); and (4) petitioner refers to "the COB boycott" (Pet. p. 6) as if petitioner's creative alleged boycott claim had been sustained whereas, in fact, it was rejected by the Courts below.

Petitioner's "Statement of the Case" assembles a vast conspiracy out of thin air, in total disregard of the actual finding of facts in the Courts below.

(2) Respondents' Statement.

As the Court of Appeals stated:

> "The American Family Life Assurance Company of Columbus, Georgia, sued Blue Cross and Blue Shield of Florida. The complaint charged that enforcement of a 'coordination of benefits' provision contained in defendants' plans for hospital and surgical benefits violated Section 1 of the Sherman Act, 15 U.S.C. §1. Specificially, it was urged that the practice constituted boycott,

*In the face of widespread use of COB, Petitioner's growth rate in fact, has increased so that each year for the past several years it has grown faster than the year before (App. 2245). Its earnings increased 204% in 1971 (App. 3802).

coercion, intimidation, and other prohibited restraints of trade. A plan covering the municipal employees of Miami Beach was especially challenged.

* * *

"The primary business of American Family Life is the sale of cancer plan insurance policies which provide for payment solely in the event of certain expenses incurred in connection with a confirmed diagnosis of cancer. Such payments are made regardless of any benefits paid on the same risk by other insurance companies.

"Blue Cross, a non-profit corporation, operates a hospital service plan.

"Blue Shield, likewise a non-profit corporation, operates a medical or surgical plan.

"Although there is some cavil to the contrary, both of these defendants are clearly subject to the supervision and regulation of the Florida Department of Insurance.

"The coordination of benefits, sometimes referred to as 'COB', is at the heart of the controversy. COB simply means that if the same hospital, surgical, or medical risk is covered by more than one insurance carrier then the company insuring with a COB provision in its policies may reduce the amount of its payments by that

payable from some other coverage. In other words, the claimant may not recover twice for the same expenses. If more than one policy of insurance has a COB provision then the primary carrier rule is applied."

The District Court described COB as follows:

Adoption of a model COB provision was recommended in December 1962 by four trade associations of private health insurance companies, namely, the Health Insurance Association of America, the Life Insurance Association of America, the American Life Convention, and the Health Insurance Council. COB has as its primary characteristic a structure of priority of claim payments which enables *broad risk accident and health insurance carriers* to reduce the amount of premiums paid out by limiting the claimants to a single payment of benefits for a single medical risk.

"If two or more policies would result in payment for more than 100% of the expenses, then coordination of benefits is applied. If, therefore, as is not infrequently the case in the event of a serious injury or illness, two or more policies, with or without coordination of benefits, provide together total benefits less than the expenses, coordination is not applied. For example, if as a result of a serious illness, hospital and medical expenses of $10,000 are incurred, and under two group policies a total of $7,500 is available, co-

ordination of benefits would not apply at all. If hospital and medical expenses of $1,000 are incurred and $800 is available under one policy and $800 under another, and if either one or both of the policies have a coordination of benefits clause, then rather than paying $1,600, the total benefits under both policies would be limited to $1,000 by application of the coordination of benefits clause or clauses.

"When both policies have a coordination of benefits clause, then an order of benefits rule — the primary carrier rule — is applied. Under these rules, for example, the husband's carrier is considered primary and the wife's carrier secondary so that in the example, the husband's carrier would pay $800 and the wife's carrier would pay only $200 to bring the total up to 100%. When only one of the policies has a coordination of benefits clause, then the carrier without a coordination of benefits clause, such as the plaintiff, would always be deemed primary. This is known as the automatic primary rule or the dumping clause.

"The carrier without a coordination of benefits clause pays no more in that event than it has obligated itself to pay by its policy contract and the operation of the automatic primary rule or dumping clause cannot cause such a company to pay more than it would pay whether or not

the other company had a coordination of benefits clause.

"With the approval of the Insurance Commissioner of Florida (as the District Court found), the appellees began to write group hospital and group medical or surgical service plans with a coordination of benefits provision. They have continued also to write this coverage without coordination of benefits provisions and a substantial number of subscribers are covered by such group contracts.

The District Court expressly found that the initiation of the COB provisions was done without any intent to harm the plaintiff's business, but rather was done so that Blue Cross and Blue Shield could remain competitive in the field of broad risk group health and accident insurance; the purpose was to avoid always paying first under the "dumping clause" of the model COB provision which had been adopted on a widespread basis by the private insurance industry in 1963 and 1964. The "dumping clause" is the portion of the Blue Cross-Blue Shield COB plan to which American Family Life objects.

American Family Life contends that its allegations of boycott are supported by what took place in Miami Beach. Since January, 1967, the appellees have provided group health and accident insurance coverage for the employees of the City of Miami Beach. The contract with the city includes a COB provision, so required by the city in its specifications for bids on the coverage."

After a non-jury trial on the merits, the District Court dismissed the complaint and, in an unanimous

decision now reported at 486 F.2d 225, the Court of Appeals affirmed. The Court of Appeals held:

> "We think the correct standard for the determination of the issue now before us was enunciated by the Third Circuit in The Travelers Insurance Company v. Blue Cross of Western Pennsylvania, 481 F.2d 80:
>
> > 'The anti trust laws, however, project competition, not competitors; and stiff competition is encouraged, not condemned.'
>
> 'This statement was preceeded by the observation that:'
>
> > 'In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every national enterprise does, i.e., get the best deal possible * * * Blue Cross passes along the saving thus realized to consumers.'
>
> "That is the situation here. American Family Life does not write broad coverage hospital and medical insurance. Blue Cross-Blue Shield do write such coverage. American Family Life sells cancer plan policies. Blue Cross-Blue Shield writes such coverage only as incidental to or as a part of its broad coverage which protects the insured as to many diseases or disabilities. When they include COB in their policies these companies are simply providing that to a certain

extent they shall not make the payments received or to be received from some other insurance policy, thus reducing the cost of their broad risk coverage as well as its cost to the insured.*

"This may be tough competition for American Family Life, which chooses to concentrate on only one dread risk, but the test is whether any restraint of trade thus caused is reasonable, Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958). In our opinion, there is no logical way in the context of this case which the COB provisions can be pronounced "unreasonable". We cannot say under §1 of the Sherman Act that an insurance company insuring against only one risk is entitled to dictate the terms upon which broad risk companies may offer their benefits to those individuals who need protection against many risks.

"Stated another way, may the Blue Cross-Blue Shield COB provisions be invalidated under the Sherman Act so that American Family Life may

*The rates for Blue Cross-Blue Shield group contracts are based on the experience of the group (App. 972-973; 1074-1075; 1752-1753; 2206-2207). Savings from the application of COB, therefore reduce premiums (App. 2206-2207). Through the application of COB, Blue Cross and Blue Shield saved $5,545,123.01 in 1971 (Defendants Ex. 27, App. 3796), and therefore, without reducing any subscribers benefits to less than 100% of covered expenses, charged their subscribers $5,545,123.01 less for their Blue Cross-Blue Shield coverage in 1971. As the Deputy Insurance Commissioner testified, "The purpose of it [COB] is to reduce excess payment of claims [in excess of 100% of expenses] and correspondingly to reduce the premium being paid by the group policyholder." (App. 2143-2144).

write its cancer policies in the form it desires while at the same time denying the same right to Blue Cross-Blue Shield as to broad coverage? We think not, and we so hold.

"While the District Court apparently chose to base its dismissal on "no competition", we base ours on the view that the record fails to reflect any prohibited competition.

"In this context we attribute no controversial significance to what occurred as to the contract with the City of Miami Beach. There the insurer [was] asked for bids on coverage that would include COB provisions. American Family Life did not offer a bid. It does not write the type of insurance which the purchasers desired."

## ARGUMENT

Petitioner's arguments not only bear no reasonable relation to the record in or decisions of the Courts below but are equally without foundation in fact. As one typical example, petitioner states that:

"The grim fact of life confronting non-COB carriers is that if they can't or won't join, *they themselves must pay the claims otherwise paid* by the numerous and dominant COB carriers." (Pet. p. 8)

In fact, as the Deputy Insurance Commissioner testified:

> "Q. Mr. Alexander, Mr. Hoffmann asked you about what happens to the carrier without a coordination of benefits clause.
>
> Does such a carrier, because of the coordination of benefits, pay one cent more than it has obligated itself to pay by its contract?
>
> "A. No, it pays its regular benefits in the contract." (App. 2183)

and the District Court found:

> "The carrier without a coordination of benefits clause pays no more in that event than it has obligated itself to pay by its policy contract and the operation of the automatic primary rule or dumping clause cannot cause such a company to pay more than it would pay whether or not the other company had a coordination of benefits clause." (App. 2355)

The use of COB with the approval of the State, at the instance of the group insurance customer, resulting in lower premiums, simply cannot be fairly or accurately characterized as a refusal to deal.

**1. The McCarran Act: State Regulation and Approval of COB.**

Petitioner seeks to nullify the McCarran Act, 15 U.S.C. §§ 1010-1013, by explosion of the boycott exception, 15 U.S.C. § 1013(b), to complete coverage of the very core of the business of insurance. In petitioner's view, the McCarran Act notwithstanding, to adhere to the Sherman Act's prohibition of boycotts, insurers must design their policies, irrespective of the wishes of the insured or the resulting increase in prices, to maximize marketability of petitioner's remarkably profitable product.*

The McCarran Act, 15 U.S.C. §§ 1010-1013, declares "the business of insurance" exempt from the antitrust laws except for the Sherman Act's prohibition of boycotts, coercion or intimidation (15 U.S.C. § 1013(b)). As the Supreme Court stated in *S.E.C. v. National Securities*, 393 U.S. 453, 459, 21 L.Ed.2d 668, 676, 89 S.Ct. 564 (1969):

> "The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation,"
>
> * * *
>
> "Congress was concerned with the type of state regulation which centers around the contract of insurance, the transaction which Paul v.

*Petitioner pays out only 39% of its premium dollar in benefits (App. 526-528). Respondents, in contrast, pay out 95% of their total income in benefits (App. 126; App. 142-146). Most people buy cancer coverage out of fear. (e.g. App. 1942, 1944-46) Petitioner's "social utility" argument (Pet. p. 11) is irrelevant hyprocrisy.

> Virginia held was not 'commerce'. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement — these were at the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was — it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, drectly or indirectly, are laws regulating the 'business of insurance.' " S.E.C. v. National Securities, 393 U.S. 453, 459, 21 L.Ed.2d 668, 676 (1969)

This case deals with the type of policy that may be issued and its enforcement — the "core of 'the business of insurance' ".

As the District Court found and the Court of Appeals stated, the use of COB was specifically approved by the Department of Insurance of Florida (App. 2144-2151, Defendants Ex. 9, App. 3593).

Under the McCarran Act, differing state policies concerning COB have developed. As petitioner's President Amos testified:

> "Q. Some states are in favor of it, other states are against it; is that a fair statement, sir?

"A. Yes, that's a fair statement. Some commissioners agree with it, and some totally disagree." (App. 2245)

**2. Consumer Choice.**

Petitioner has chosen the City of Miami Beach group policy as its example of the use of COB (Pet. p. 5, Pet. App. 2a, 5a, 6a, 7a and 17a). As the Court of Appeals stated:

> American Family Life contends that its allegations of boycott are supported by what took place in Miami Beach. Since January, 1967, the appellees have provided group health and accident insurance coverage for the employees of the City of Miami Beach. The contract with the city includes a COB provision, so required by the city in its specifications for bids on the coverage.
>
> (Pet. App. 5a; App. 752)

Respondents offer group policies to the public with or without COB (Pet. App. 4a-5a; Stipulated Facts, paragraph 13, App. 752). The choice of whether to include COB in a group contract rests, as it should in a free economy, upon the consumer. Petitioner argues that the Sherman Act may be employed to deny to the many group customers such as the City of Miami Beach (Pet. App. 4a, 5a; App. 752), Southern Bell (Pet. App. 15a, 16a; App 750) and the Federal Government, (App. 3313 at 3319), who have demanded the inclusion of COB in

their policies in order to achieve the resultant reduction in cost and price, the trade freedom to determine the terms of their own insurance policies.*

### 3. Boycotts or Joint Refusals to Deal Under The Sherman Act.

Petitioner alleged, as the District Court stated:

> "Both alleged conspiracies to boycott allegedly have as their purpose and effect to exclude the plaintiff from vast segments of the market . . ."

Petitioner totally failed to prove, as it alleged, that respondents employed COB for the purpose and effect of excluding petitioner from the market. As the District Court found:

> "The initiation by the defendants of the use of COB provisions was done without any intent to harm the plaintiff's business, but rather it was put into use so that the defendants could remain competitive in the field of broad risk group health and accident insurance." (Pet. App. 17a)

> "The effect on the plaintiff's business, which is non-competitive in Florida with that of the defendants', is only a side effect of a move made

*The City of Miami Beach, by requiring COB by their specifications, according to petitioner, is a "co-conspirator" (App. 1963). The Comptroller General of the United States (App. 3714-3740) for recommending COB and the Federal Government, for requiring COB in the Federal Employees Program (App. 3313 at 3319; see also App. 117-119) must by the same reasoning also be "co-conspirators."

> by the defendants to enable them to remain competitive in their own market." (Pet. App. 21a)

In the Court of Appeals, Petitioner continued to maintain that purpose and intent were determinative. As the Court of Appeals pointed out, petitioner argued there that the District Court's findings that respondents did not intend to injure petitioner were "clearly erroneous" (Pet. App. 8a; Point IV in Brief in Court of Appeals). Now, after the petitioner failed to prove its allegations, and after adverse findings of fact in the District Court and after rejection of its position in the Court of Appeals, the Petitioner advances for the first time in this Court the contention that purpose and intent are immaterial.

Petitioner sets forth long strings of citations, but no analysis, of the group refusal to deal or boycott decisions of this Court. It confuses the question of whether, in the first instance, a boycott within the meaning of the Sherman Act exists with the question of whether, given such a refusal to deal or boycott, an alleged good motive is a defense. The first decision of this Court describing the economic weapon of a collective refusal to deal as a boycott illegal *per se, Fashion Originators Guild of America v. F.T.C.*, 312 U.S. 457, 85 L.Ed 949, 61 S.Ct. 703 (1941), furnishes a perfect example of this vital distinction obscured by petitioner's simplistic approach. In *Fashion Originators Guild*, members of the combination, to combat what they called unethical and immoral style piracy, implemented a plan which had:

> ". . . both as its necessary tendency and as its *purpose and effect the direct suppression of com-*

> *petition* from the sale of unregistered textiles and copied designs . . ." 312 U.S. at 465

by declining to sell their products to retailers who sold garments copied from the designs of members (312 U.S. at 464). Members of the Guild:

> ". . . combined among themselves to combat and, if possible, destroy all competition from the sale of garments which are copies of their 'original creations'. They admit that to destroy such competition they have in combination purposely boycotted and declined to sell their products to retailers who follow a policy of selling garments copied by other manufacturers from designs put out by Guild members." (312 U.S. 357 at 461)

After finding the combination for the purpose of destruction of competition from those who copied original designs a boycott in violation of the Sherman Act, the Court held that the reasonableness of opposition to the style pirates and the question of whether systematic copying of designs was tortious were not defenses. The Court did not in any way hold that the purpose of the combination was immaterial or, as petitioner contends, that an adverse side effect of the pursuit of otherwise lawful business objectives constitutes a boycott illegal *per se*.

The other decisions of this Court cited by petitioner similarly do not support its thesis. Each of these cases involve a collective refusal to deal for the purpose of stifling or eliminating competition, or as *Northern Pacific Railway v. United States,* 356 U.S. 1, 2 L.Ed.2d 545, 78

S.Ct. 514 (1958), deal with other Sherman Act violations and refer to boycotts as involved *Fashion Originators Guild* as examples of *per se* violations. For example, *White Motor Co. v. United States,* 372 U.S. 253, 9 L.Ed.2d 738, 83 S.Ct. 696 (1963) described group boycotts as illegal *per se* because they are "naked restraints of trade with no purpose except stifling competition", 372 U.S. at 263, and *Associated Press v. United States,* 326 U.S. 1, 89 L.Ed. 2013, 65 S.Ct. 1416 (1945) involved By-Laws "designed to stifle competition in the newspaper publishing field." 326 U.S. at 11.

None of the 43 cases cited by petitioner supports its basic contention that the incidental adverse side effect of an action taken in furtherance of competition in response to the demands of the market place, and which secures the benefits of competition in the tangible form of lower prices, constitutes a boycott illegal *per se in* violation of Section 1 of the Sherman Act.

Should petitioner's thesis be accepted, then the Sherman Act would no longer be a "charter of economic liberty", *Northern Pacific Railway Company v. United States,* 356 U.S. 1, 2 L.Ed.2d 545, 78 S.Ct. 514 (1958), but would instead compel respondents and its group customers to surrender their own trade freedom and sacrifice their own legitimate interest in the best broad risk group insurance at the lowest possible price in order to maximize the market for petitioner's non-competitive product. The implications of petitioner's contention are staggering. It argues that the presence of what it calls "exclusionary effect" is conclusive evidence of a *per se* violation of the

Sherman Act. If such "exclusionary effect" although a side effect is conclusive, then by petitioner's reasoning, the joint action of an employer and insurer in providing group insurance coverage for employees would be itself a boycott because it has an "exclusionary effect" by reducing the marketability of any individual health insurance policy in a market consisting of employees covered by the group policy. Similarly, under petitioner's theory, the American Cancer Society and the medical research teams it supports are engaged in a not yet successful boycott of petitioner's dread disease cancer policies.

Stripped of overblown facts and strings of inapplicable citations without analysis, petitioner's case does not present a substantial question for resolution by this Court. The action of respondents simply cannot be fairly characterized as a group refusal to deal or boycott. The intricate group boycott questions posed by the petitioner are not based on the record in or decisions of the Courts below.

**4. The Decision of the Court of Appeals.**

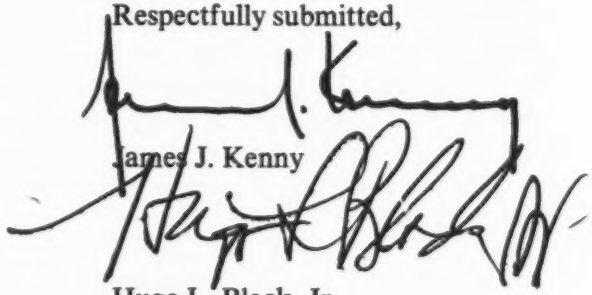
For reasons well stated in the opinion of the Court of Appeals, petitioner's contentions were rejected. As in this case, the plaintiff in *Travelers Insurance Company v. Blue Cross of Western Pennsylvania,* 481 F.2d 80 (3 Cir. 1973), cert. denied December 10, 1973, ____ U.S. ____, 38 L.Ed.2d 550, cited by the Court of Appeals, contended that the terms of State approved contracts, while there with hospitals and in the instant case with subscribers, amounted to boycott, coercion or intimidation within the exception to the McCarran Act, 15 U.S.C. § 1013(b). As the Court

of Appeals stated, relying upon the *Travelers* case and upon well established principles, the antitrust laws protect competition, not competitors. Respondents use of COB, at the instance of the consumer, has reduced the cost of respondents broad risk coverage. The antitrust laws are designed in the public interest to secure, not to prohibit, the benefits of competition in the form of lower prices.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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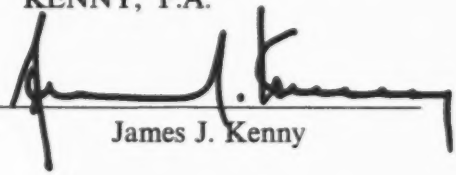
## CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served with the foregoing Brief in Opposition to Petition for Writ of Certiorari, by depositing three copies in a United States mail box, with air mail postage prepaid, addressed to Malcolm A. Hoffman, Law Firm of Malcolm A. Hoffman, 12 East 41st Street, New York, New York 10017, in accordance with Section 1 of Rule 33 on this 8th day of March, 1974.

KELLY, BLACK, BLACK & KENNY, P.A.

By 

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